IN THE HIGH COURT OF BOMBAY AT GOA.

WRIT PETITION NO. 469/2004.

1. Martin Kerr Roberts
son of Harry Roberts
aged 52 years, married, service,
British National.

2. Mrs. Annitte Sylvia Louie Roberts
Wife of Martin Kerr Roberts
aged about 48 years, British Nationals,
Both residing at House No.437,
Almeida Waddo, Parra, Bardez, Goa.
duly represented by their lawful attorney
Mr. Gregory Marcus Pacheco,
Aged about 33 years, R/o.
Almeida Waddo,
Parra, Bardez, Goa. ..... Petitioners.

V/s.

1. Macario Antonio Francis de Cunha,
aged 55 years, retired from service,

2. Mrs. Santana de Cunha
Wife of Macario A.F. de Cunha aged
About 53 years, housewife,
Both R/o. Sales Waddo,
Parra, Bardez, Goa. ..... Respondents.

Mr. Valmiki Menezes, Advocate for the petitioners.

Mr. D. Pangam, Advocate for the respondents.

CORAM : R.M. LODHA, J.

DATE : 25TH AUGUST, 2005.

ORAL JUDGMENT :

Heard Mr. Valimiki Menezes, the learned Counsel for the petitioners and Mr. D. Pangam, the learned Counsel for the respondents.

2. Rule, returnable forthwith. Rule is heard finally at this stage.

3. This writ petition is directed against the order dated 30th April, 2004 whereby the IInd Addl. District Judge, North Goa, Panaji rejected the application made by the present petitioners for condonation of delay in filing the appeal against the Order dated 6th September, 2003 passed by the Civil Judge, Jr. Division, Mapusa.

4. The present petitioners are the original plaintiffs in Regular Civil Suit No.35/01/E. They made an application for grant of temporary injunction against the defendants (the respondents herein). The trial Court vide its order dated 6.9.2003 dismissed the application made by the plaintiffs-petitioners for grant of temporary injunction. Aggrieved thereby, the appeal was preferred on 17.11.2003. Since the appeal was

barred by time, a civil application for condonation of delay was also made. In that civil application, the petitioners stated that soon after the impugned order came to be passed on 6.9.2003, the Director of Panchayats passed an order on 3.10.2003 in a Panchayat Appeal wherein the present respondents were also parties. The attorney of the petitioners consulted the Advocate about further course of action against both the orders, namely Order dated 6.9.2003 passed by the Civil Judge, Jr. Division, Mapusa and the order of the Director of Panchayats. The attorney of the petitioners applied for certified copy of the order passed by the Director of Panchayats to file writ petition. He was told that limitation to file an appeal to the District Court was 30 days and to the High Court was 90 days. However, the attorney not being well conversant with the legal procedure got confused and was under bona fide belief that the limitation for filing the appeal was 90 days. The attorney of the petitioner contacted Advocate Valmiki Menezes on 7.11.2003 for filing the writ petition and the appeal. He was informed that the appeal from the order dated 6.9.2003 lay to the District Court and for that limitation had already expired. The petitioners applied for another certified copy on 7.11.2003, which was delivered on 14.11.2003 and the appeal came to be filed on 17.11.2003.

5. The application was contested by the respondents. The respondents submitted that after dismissal of the application for temporary injunction on 6.9.2003, they waited for 10 days and thereafter demolished the temporary compound wall and constructed a permanent boundary wall except the installation of back side service gate and plastering of the wall internally. It was submitted that the application for condonation of delay was vague deliberately and that full and correct facts have not been disclosed by the petitioners.

6. The appeal Court dismissed the application for condonation of delay. Aggrieved thereby, the present writ petition has been filed. It is true that in the application for condonation of delay the petitioners have not specifically averred that the application for certified copy of the Order dated 6.9.2003 was made on 18.9.2003. However, mala fides cannot be attributed to the petitioners for this lapse. Firstly, the certified copy of the Order dated 6.9.2003 itself was placed on record by the petitioners and that reflected that the application was made on 18.9.2003. Secondly, in paragraph 7, the petitioner stated that application for another certified copy was made on 12.11.2003. Obviously, reference to another copy made in paragraph 7 relates to the application that was made on

18.9.2003. In this view of the matter, much capital cannot be drawn out of the lapse on the part of the petitioners in not specifically mentioning in the application that the first application for certified copy was made on 18.9.2003. As a matter of fact, the petitioners had been candid and honest in making statement in the application that when the attorney met the Advocate he was informed that the limitation for appeal to the District Court was 30 days and to High Court was 90 days. However, the attorney got confused and formed the belief that the limitation for filing the appeal was 90 days. Be that as it may, the facts that have come on record do not show any lack of diligence on the part of the petitioners or their attorney in prosecuting the matter for filing the appeal and malice cannot be attributed in not filing the appeal in time. There was bona fide lapse on the part of the petitioners in filing the appeal belatedly and the facts set out in the application make out sufficient cause for condonation of delay within the meaning of Section 5 of the Limitation. Act.

7. The learned appeal Court had been too hyper-technical and did not consider the application for condonation of delay with justice oriented approach. The delay of course was there, but that was of few days and that happened because of bona fide

belief of the attorney of the petitioners that limitation for filing the appeal was 90 days.

8. Whether the appeal filed by the petitioners was meritorious or not, could only be examined after the delay was condoned and the appeal after registration was heard.

9. I am satisfied that the appeal Court committed illegality and material irregularity in exercise of its jurisdiction in dismissing the application for condonation of delay.

10. Rules is accordingly, made absolute. The impugned Order is set aside. The application made by the petitioner for condonation of delay stands allowed The appeal Court is directed to hear the appeal against the Order dated 6.9.2003 on merits.

No costs.

R.M. LODHA, J.

Ssm.